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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations
(Montauk, New York)

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)
)
)

MB Docket No. 03-155
RM-10735

To: Chief, Allocations Branch
Stop Code 1800D5

RECEIVED

AUG 25 2003

Federal Communications Commission
Office of the Secretary

COMMENTS OF COX RADIO, INC.
AND CXR HOLDINGS, INC.

Cox Radio, Inc. and its subsidiary CXR Holdings, Inc., licensee of Radio Station WEZN-FM, Bridgeport, Connecticut (collectively "Cox Radio"), by its attorneys, hereby respectfully submits these comments in the above-captioned proceeding on the question of whether a third local aural service should be allotted to the community of Montauk, New York.¹ As the Commission correctly recognized in the *Notice*, the proposed allotment to Montauk requires a site restriction to avoid short-spacing to Cox Radio's Bridgeport station, WEZN-FM. Because of the site restriction, the area-to-locate available for the new Montauk allotment is extraordinarily small and is comprised primarily of state park land.² Given the extremely restrictive area in which a tower could be located without short-spacing to WEZN-FM, the proposed allotment should be rejected as no feasible transmitter site exists.

¹ Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Montauk, New York), *Notice of Proposed Rule Making*, MB Docket No. 03-155, RM-10735, DA 03-2104 (rel. July 3, 2003).

² See Exhibit A (Technical Statement by du Treil, Lundin & Rackley, Inc. showing permissible area-to-locate); Exhibit B (Maps of Proposed Montauk, New York Allotment).

I. COMMISSION PRECEDENT REQUIRES A REASONABLE ASSURANCE THAT A TRANSMITTER SITE IS AVAILABLE BEFORE A NEW ALLOTMENT IS MADE.

The Commission will not allot a proposed channel "absent a reasonable assurance that transmitter sites are available which will permit a station to operate in compliance with the Commission's technical requirements."³ Although the Commission generally presumes that a technically feasible site is available for a transmitter at the allotment stage, the presumption is rebuttable.⁴ The Commission will deny a proposed allotment if it determines that no suitable sites exist to locate a transmitter in compliance with the Commission's rules, including the city grade coverage and minimum distance separation requirements.⁵ In making this determination, the Commission will consider evidence regarding zoning, FAA regulations, and other factors.⁶

Here, as demonstrated below, local zoning and environmental and historical concerns make it virtually certain that a radio tower cannot be constructed at the proposed reference site or within the area-to-locate specified in the *Notice*. Accordingly, under Commission precedent, the

³ Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Creswell, Oregon), *Report and Order*, 3 FCC Rcd 4608, ¶ 3 (1988).

⁴ See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (San Clemente, California), *Memorandum Opinion and Order*, 3 FCC Rcd 6728, ¶ 6 (1988); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Hartford, Vermont), *Report and Order*, 8 FCC Rcd 4920, ¶ 4 (1993) ("*Hartford*").

⁵ Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (St. Maries, Idaho and Spokane, Washington), *Report and Order*, 14 FCC Rcd 17012 (1999) ("*St. Maries*"); see, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Moncks Corner, Kiawah Island, and Sampit, South Carolina), *Report and Order*, 11 FCC Rcd 8630, ¶ 14 (1996) ("*Moncks Corner*").

⁶ See, e.g., *St. Maries*; *Moncks Corner*; Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Sebring and Miami, Florida), *Report and Order*, 10 FCC Rcd 6577 (1995); *Hartford*.

burden shifts to the petitioner to affirmatively show that a transmitter site is available.⁷ Because the petitioner cannot demonstrate that a radio tower can be built either at the proposed site or within the area-to-locate, the proposed Montauk allocation must be denied.

II. A TRANSMITTER SITE IS NOT AVAILABLE IN THE AREA-TO-LOCATE.

The Commission must reject the proposed Montauk allotment because local zoning restrictions and historical and environmental concerns will prevent anyone from constructing a tower at the proposed site coordinates or within the area-to-locate. Cox Radio has contacted the local land owner of the proposed site and confirmed that the site is not available for sale or for use as a transmitter site.⁸ Moreover, as the attached photographs of the proposed site demonstrate, the area is in a wetlands, and therefore federal and state environmental restrictions are likely to prohibit the construction of a radio transmitter.⁹

Given that the local land owner has stated that his land is unavailable for use as a transmitter site (and that the site is likely unsuitable for environmental reasons), CXR has examined the remaining property within the area-to-locate. As the map attached at Exhibit A shows, the permissible area-to-locate for the new allotment is very small because of spacing considerations for WEZN-FM. Most of this land is comprised of two state parks: Montauk Point State Park and Camp Hero State Park.

⁷ See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Kimberly, Idaho), *Report and Order*, 15 FCC Rcd 10298, ¶ 4 (2000); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cusseta, Georgia), *Report and Order*, 6 FCC Rcd 7437, ¶ 4 (1991).

⁸ See Exhibit C (Memorandum from Lawrence J. Holt, Esq. to CXR Holdings, Inc. dated August 21, 2003).

⁹ See Exhibit D (Photographs of Proposed Allocation Site Taken August 8, 2003).

Each of these parks contains significant historical structures that are the subject of intense community interest. Montauk Lighthouse, the first lighthouse built in New York State and the fourth oldest active lighthouse in the country, is located in Montauk Point State Park.¹⁰ Authorized by the Second Congress in 1792 under President George Washington, construction was completed in 1796.¹¹ Today the lighthouse is owned and maintained by the Montauk Historical Society, a community organization dedicated to preserving the history of Montauk.¹² The lighthouse is still used as a working lighthouse, and its light can be seen from a distance of 19 nautical miles.¹³ Locating a radio tower nearby will surely raise serious concerns for the local citizens and historical societies.

Camp Hero State Park has an even more colorful past (and present). Formerly a military installation, the Montauk Air Force base was an important link in the Cold War defenses of the United States.¹⁴ Still remaining in the park are numerous historical military structures, many of which are the subject of preservation efforts.¹⁵ Possibly because of the Cold War secrecy surrounding the base activities, Camp Hero and the Montauk Air Force Station have been featured in numerous books and articles that associate the base with secret military experiments

¹⁰ The Official Montauk Point Lighthouse, *Lighthouse Facts*, at <http://www.montauklighthouse.com/facts.htm> (visited Aug. 25, 2003).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Montauk Air Force Station, *Montauk Air Force Station: Historical Background*, at <http://www.fortunecity.com/marina/seafarer/665/hist-01.html> (visited Aug. 22, 2003).

¹⁵ Montauk Air Force Station, *Camp Hero & Montauk Air Force Station: Historic Preservation*, at <http://www.fortunecity.com/marina/seafarer/665/pres-00.html> (visited Aug. 22, 2003); Montauk Air Force Station, *Montauk Air Force Station: Historic Radar Equipment*, at <http://www.fortunecity.com/marina/seafarer/665/radar-00.html> (visited Aug. 22, 2003).

and other similar claims.¹⁶ Accordingly, two very different groups of preservationists, military historians and paranormal adherents, are active in Camp Hero affairs.

Cox Radio estimates that only 68 acres of land available in the area-to-locate is held by private parties.¹⁷ This land is zoned for residential use only, and grant of a special use permit for a commercial use such as a transmitter site is unlikely, especially given that the area is comprised of large, private estates.¹⁸ Further, consultation with the New York Department of Environmental Conservation indicates that the land in private hands is comprised primarily of wetlands, and the Department stated that it would be against allowing the construction of a tower in this area.¹⁹

Because of the unique conflux of zoning, historic and environmental factors that exist for the entire area-to-locate, it is the opinion of a local zoning expert that a transmitter site will not be available for the proposed Montauk allotment.²⁰ This opinion is buttressed by the fact that an earlier Montauk allotment had its construction permit dismissed because the applicants were unable to obtain a suitable transmitter site.²¹ In fact, the applicants had requested an extension of time to construct, citing zoning problems, and subsequently concluded that their only "realistic

¹⁶ See, e.g., K.B. WELLS, JR., *THE MONTAUK FILES: UNEARTHING THE PHOENIX CONSPIRACY* (1998); STEWART SWERDLOW, *MONTAUK: THE ALIEN CONNECTION* (Peter Moon ed., 1998); PRESTON B. NICHOLS & PETER MOON, *THE MONTAUK PROJECT: EXPERIMENTS IN TIME* (1992).

¹⁷ See Exhibit A.

¹⁸ Some of the land may actually be a nature sanctuary owned by The Nature Conservancy as a posted sign slightly west of the proposed allocation indicates. See Exhibit E (Photograph of Area West of the Proposed Allocation Site Taken August 8, 2003).

¹⁹ See Exhibit C.

²⁰ See Exhibit C.

²¹ See Women Broadcasters, Inc. For Reinstatement of Construction Permit For Unbuilt Station WVZC(FM) Montauk, New York, *Memorandum Opinion and Order*, 12 FCC Rcd 7824 (1997) (*petition for reconsideration pending*).

alternative” was to seek co-location on the tower of the first Montauk station, WBEA(FM).²²

Negotiations with WBEA(FM) proved unsuccessful, and the Commission upheld the cancellation of the permit.²³ Here, even co-location would not be an alternative, as there are no commercial towers within the area-to-locate.²⁴

CONCLUSION

In light of the foregoing, the Commission should deny the proposal to allot a new aural facility to Montauk, New York, on Channel 261A. Rather than consume Commission resources in making and auctioning a new allotment that will only result in petitions for additional time to construct or petitions for waivers of Commission technical requirements, the Commission should

²² *Id.* at ¶ 2.

²³ *Id.*

²⁴ The transmitter site for WBEA(FM) is a considerable distance from the area-to-locate and would not be suitable for the proposed new Montauk allotment. *See* FCC Audio Division, *Distance and Bearing Calculations Between Two Sets of Coordinates (FCC) USA*, at <http://www.fcc.gov/mb/audio/bickel/distance.html> (visited Aug. 25, 2003).

demand that the petitioner provide reasonable assurance that a transmitter site is available.

When the petitioner fails to provide the Commission with documentation from a landowner that a site is available, the allotment proposal should be denied.

Respectfully submitted,

CXR HOLDINGS, INC.

By: 

Kevin F. Reed

Christina H. Burrow

Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036
(202) 776-2000

August 25, 2003

Exhibit A

Technical Statement by du Treil, Lundin & Rackley, Inc.

TECHNICAL EXHIBIT
IN SUPPORT OF COMMENTS OF COX RADIO, INC.
AND CXR HOLDINGS, INC.

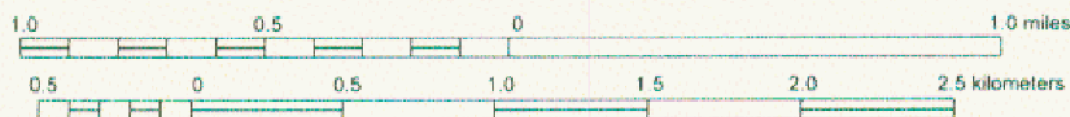
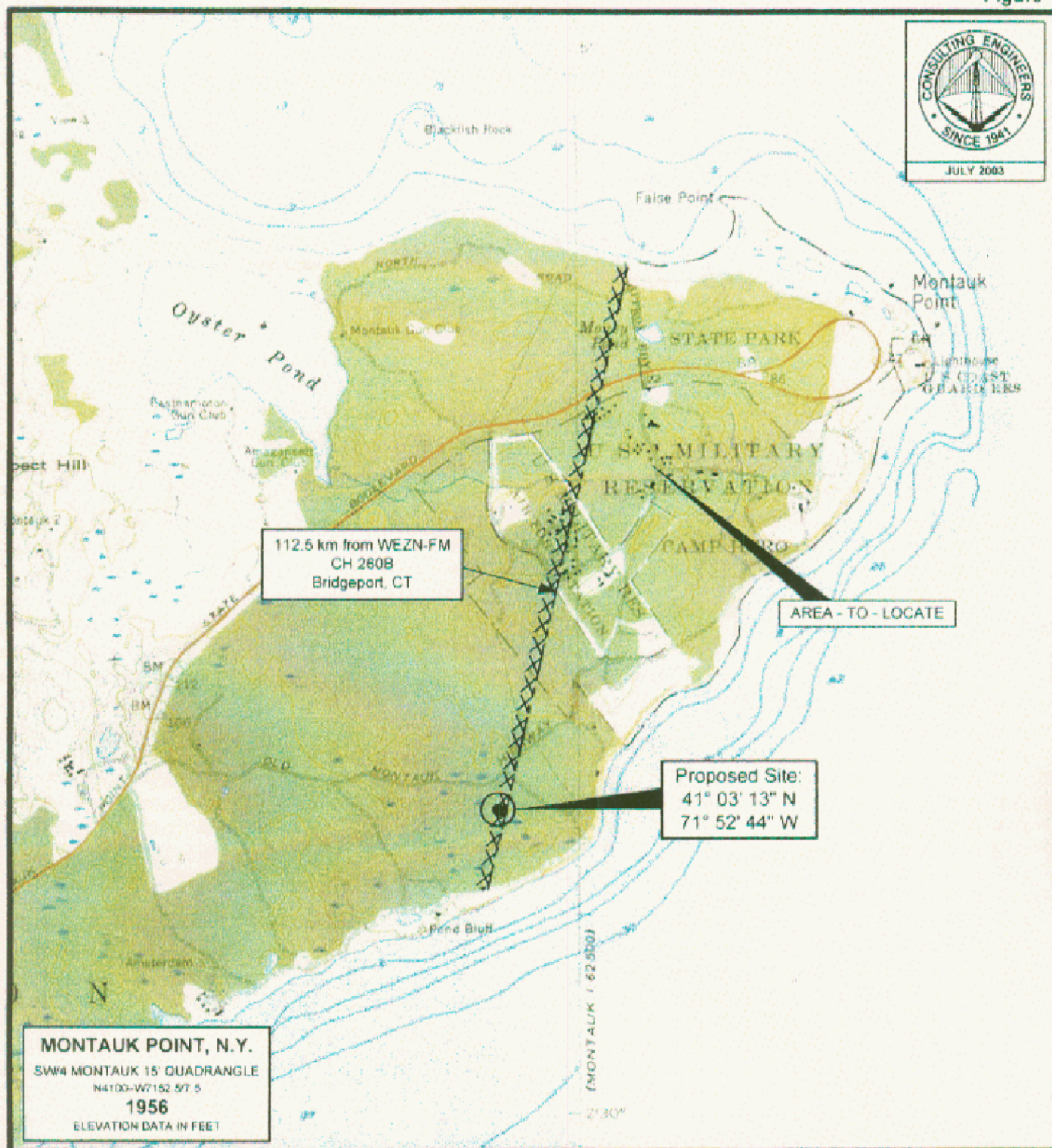
Technical Statement

This Technical Exhibit, of which this Statement is part, was prepared to address the area-to-locate for a proposed Channel 261A at Montauk, New York. Attached as Figure 1 shows the area-to-locate for the proposed Class A allotment, and the proposed allotment reference site provided by the Petitioner.

As can be seen, local or state parks encompass most of the Channel 261A permissible area-to-locate area. It can be calculated that of the total land area of 650 acres within the area-to-locate, only 68 acres located outside of any local or state park. The state and local park boundaries were obtained from the 2000 Census TIGER files.

Charles A. Cooper
du Treil, Lundin & Rackley, Inc.
201 Fletcher Avenue
Sarasota, Florida 34237
(941) 329-6000
August 25, 2003

Figure 1



AREA - TO - LOCATE MAP FOR CHANNEL 261A

MONTAUK, NEW YORK

PREPARED FOR COX BROADCASTING INC.

du Treil, Lundin & Rackley, Inc. Sarasota, Florida

Exhibit B

Maps of Proposed Montauk, New York Allotment



0 0.1 0.2 0.3 0.4 0.5 km
0 0.1 0.2 0.3 0.4 0.5 mi

Map center is 41° 03' 13"N, 71° 52' 43"W (NAD27)

MONTAUK POINT quadrangle

Projection is UTM Zone 19 NAD83 Datum

MN *
GN
MN=-12.861
GN=1.892





NYS Office of Parks,
Recreation and Historic Preservation

New York State Parks, Recreation and Historic Preservation

Montauk Point State Park

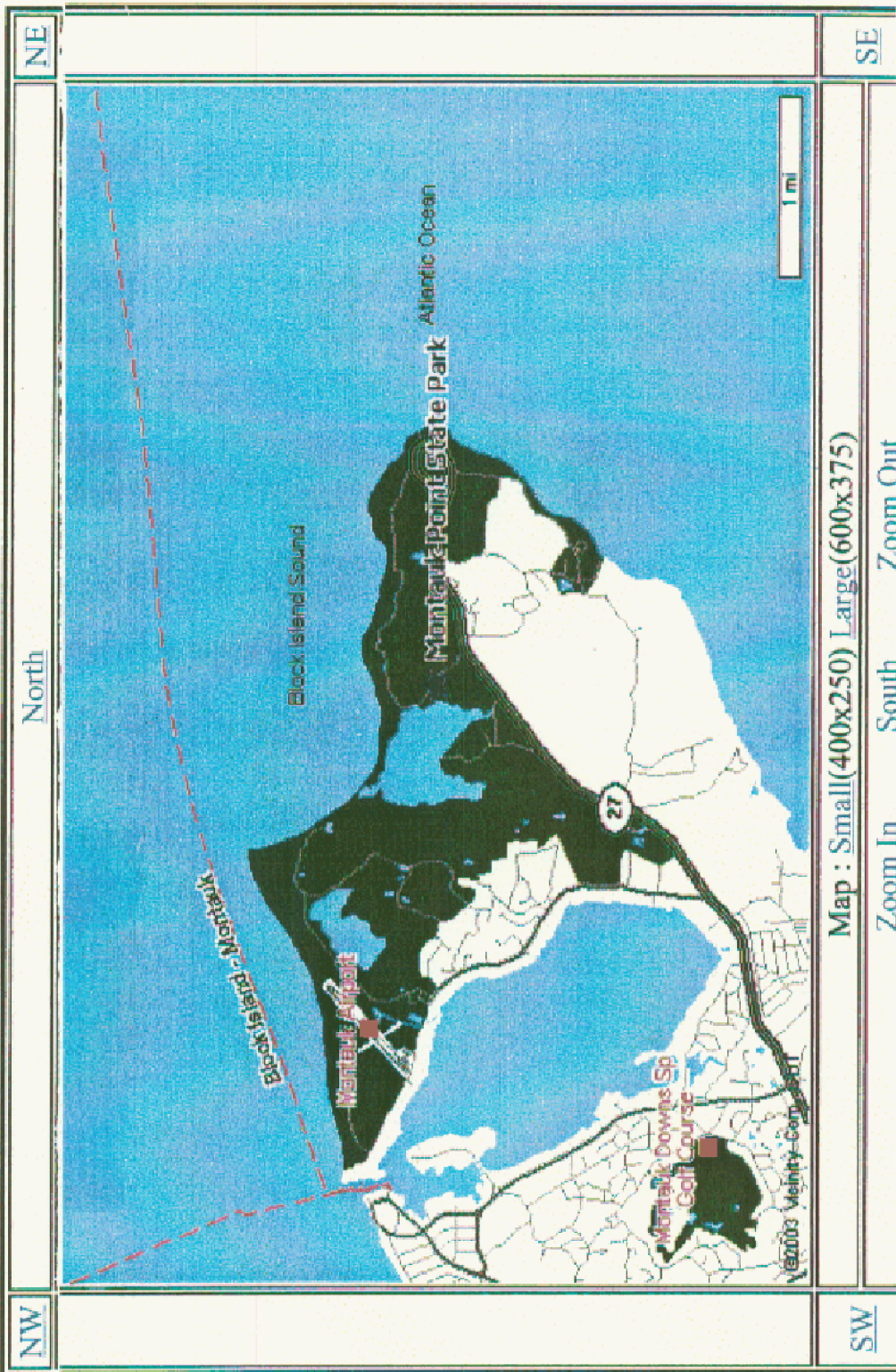


Exhibit C

Memorandum from Lawrence J. Holt, Esq. to CXR Holdings, Inc. dated August 21, 2003

Cedar, Strauss & Holt, P.C.

ATTORNEYS AT LAW

910 MIDDLE COUNTRY ROAD, SUITE 1

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MEMORANDUM

To: CXR Holdings, Inc.

From: Lawrence J. Holt, Esq.

Date: August 21, 2003

Re: Proposed Montauk Radio Allotment

Per your request of August 7, 2003, I have reviewed local land records and interviewed state and local government officials to determine whether a radio tower could be built to serve Montauk, New York as proposed by the Federal Communications Commission on July 3, 2003.¹ My review, combined with my experience as a local zoning and land use attorney, indicates that there is virtually no chance that a radio tower could be built either at the proposed site or in the area-to-locate.

First, I contacted the local landowner of the proposed site. Because the property is undeveloped, I sent a letter to the address for the property indicated in the local tax records. I received a telephone call from the landowner on the evening of August 20. He stated that no one had been in touch with him regarding the possibility of using his land as a tower site. Moreover, he strongly indicated that the land was not for sale, and he said that he would not consider allowing a tower to be built on the property.

Having determined that the proposed site is not available, I investigated the area-to-locate. As we have discussed, for the new Montauk station to be fully spaced to Cox's station WEZN-FM, the station must be built on the eastern tip of Long Island. The majority of the land available in this very small area is park land controlled by New York State. This land is comprised of Montauk Point State Park, which contains the historic Montauk Point Lighthouse, and Camp Hero State Park, a former military base that was turned over to the state and that still contains historic military buildings. Local interest in these two sites is strong, and citizen opposition to using either park for a commercial radio tower

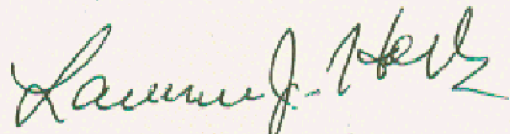
¹See Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Bangs, Texas) (De Beque, Colorado) (Montauk, New York), *Notice of Proposed Rule Making*, MB Docket No. 03-153, MB Docket No. 03-154, MB Docket No. 03-155, DA 03-2104 (rel. July 3, 2003).

would be intense. Montauk Point State Park contains the historic Montauk Lighthouse, and citizen groups are active in conserving this property. Camp Hero State Park contains sensitive and historic military buildings, and preservation groups for the Park have been vocal in the past about any changes made. Further, local zoning laws prohibit a structure such as a radio tower in a park district.²

A few parcels of private property, including the proposed site, are available in the area to locate. All of these parcels are considered "Zone B Residence" under local zoning rules, meaning that they are zoned for residential use only. To build a commercial structure such as a radio tower, an applicant would need site plan approval from the Town of East Hampton Planning Department and then would need a special permit from the Planning Board. Zoning in this part of Long Island is very strict, and zoning variances are difficult to obtain. Landowners in this area are primarily wealthy and include nationally-known celebrities, and they would use their resources to defeat any zoning variance that proposed a commercial radio tower adjacent to their properties.

Finally, I contacted the New York State Department of Environmental Conservation, and their informal review indicates that the area in question is comprised primarily of wetlands. Accordingly, they stated they would be against allowing the construction of a radio tower in this area.

Given the small area of land available in the area-to-locate and the local environmental, historical and zoning issues discussed above, it is my professional opinion that there is virtually no chance that a radio tower could be built in the area-to-locate.


Lawrence J. Holt, Esq.

² See Code of the Town of East Hampton, § 255-2-53 (Structures in Park and Conservation District)

Exhibit D

Photographs of Proposed Allocation Site Taken August 8, 2003



Second wetlands flag on the
south side of the road, 40 acre
site.





Exhibit E

Photograph of Area West of the Proposed Allocation Site Taken August 8, 2003

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516-329-7689**



FOR IMMEDIATE RELEASE:
April 22, 1997

Governor Pataki Announces Key Acquisition on Montauk Point

Governor George E. Pataki today announced the acquisition of more than 330 acres of environmentally significant land on Montauk Point, located in the Town of East Hampton. The Montauk property, known locally as "the Sanctuary", will be one of the first projects in New York State to receive funding through the Clear Water/Clean Air Bond Act.

The property has been identified as a priority project in the New York State Open Space Conservation Plan, and is located adjacent to Camp Hero and Montauk State Park on the eastern tip of Long Island.

Approximately \$4.2 million in funds from the Clean Water/Clean Air Bond Act will be used to acquire the property through the Nature Conservancy, enabling the area to remain in pristine condition.

"The Sanctuary" is a spectacular addition to the State Park holdings on the eastern tip of Long Island", said Governor Pataki, "The Clean Water/Clean Air Bond Act is returning New York to its proper role as an environmental protection leader, guarding the critically important natural areas on Long Island and across New York State."

"The Sanctuary," renown for its beauty and seclusion, consists of five different natural community types: successional maritime forest, maritime oak forest, maritime oak-holly forest, shrub swamp, and red maple-hardwood swamp. The property contains habitat for the blue spotted salamander (*Ambystoma laterale*), the spotted turtle (*Clemmys guttata*) and the tall thistle (*Cirsium altissimum*) as well as a multitude of bird species. Over 70 percent of the property is freshwater wetland.

"The purchase of the ecologically important parcel is another tangible example of how the 1996 New York State Clean Water/Clean Air Bond Act is working to preserve New York State's important natural resources and its valuable water supplies," State Parks Commissioner Bernadette Castro said. "What a nice way to celebrate Earth Day!"

The property meets many of the eligibility criteria outlined in the State's Open Space Conservation Plan. It encompasses the watershed of the Peconic Estuary, including the Pine Barrens. It is a scenic resource that provides important buffer to existing State Park lands.

"I want to thank The Nature Conservancy for once again acting as our partners and assisting our efforts to protect this unique ecosystem," said Governor Pataki, "This is another successful public/private partnership that has been the hallmark of Commissioner Castro's tenure."

"The owners are happy that a mutual agreement was worked out for the perpetual preservation of this property," said Kathleen DeLessio of the Law firm of Cacciatore & DeLessio.

Sara Davison, Executive Director of The Nature Conservancy's South Fork-Shelter Island Chapter, said, "The Nature Conservancy has been working on the preservation of the Sanctuary property for years. We are thrilled that we could assist the State with this very important acquisition, which nearly completes a major assemblage of protected land at Montauk Point."

CERTIFICATE OF SERVICE

I, Constance Randolph, hereby certify that a true and correct copy of the foregoing "Comments of CXR Holdings, Inc." was sent on this 25th day of August, 2003, via hand delivery or first-class United States mail, postage pre-paid as indicated, to the following:

John A. Karousos*
Assistant Chief
Audio Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dana J. Puopolo
2134 Oak St., Unit C
Santa Monica, CA 90405

*denotes hand delivery


Constance Randolph